No. 14,752

IN THE

United States Court of Appeals

For the Ninth Circuit

AZ DIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

LLOYD H. BURKE,
United States Attorney,
By JAMES S. EDDY,
Assistant United States Attorney,
404 Post Office Building,
Sacramento, California,
Attorneys for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

Table of Authorities Cited

Statutes

Texts

No. 14,752

IN THE

United States Court of Appeals

For the Ninth Circuit

AZ DIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

In answer to appellant's opening brief, appellee submits as follows:

STATEMENT OF FACTS.

1. On June 3, 1954, defendant owned and occupied a ranch at Box 55, Arbuckle, California. (RT 12.)

2. On said day, State Inspector House, Undersheriff Leverett, and Deputy Sheriff Crawford drove onto said ranch and found growing thereon 154 poppy plants which were about six feet tall. (RT 12, 13, 24, and 25.) The plants were pulled up and yielded 132 mature pods. (RT 28, 38, and 43.)

3. The pods from the plant were removed to a chemical laboratory and identified as opium poppy pods. (RT 48 and 49.)

4. On said day the officers found five bottles containing seeds in defendant's house. (RT 22.) These seeds were identified as opium poppy seeds. (RT 52, 53 and 54.)

5. On said day the defendant orally admitted that he had grown the opium poppy plants from seed; that he had obtained part of the seed from a drug store and part from poppy plants which he had grown the previous year. (RT 40.) He said he knew it was illegal to grow opium poppies. (RT 18, 19, 21, 35, 39, and 40.)

6. The defendant herein was indicted on June 14, 1954, at Sacramento, California. He appeared and plead not guilty to all counts on July 1, 1954. On March 1-2, 1955, trial was had before a jury at Sacramento, California, the Honorable John R. Ross presiding. A verdict of guilty on all counts was returned on March 2, 1955. On March 22, 1955, judgment was pronounced as three years' imprisonment and $500 fine on each count. The term of imprisonment on each count was made to run concurrently with the term of imprisonment on every other count. Appeal was timely made to this Court.

QUESTIONS ON APPEAL.

Appellant has urged six points upon this appeal as follows:

I.

That instruction number 14 (RT 68) is in error.

II.

That Count 3 of the Indictment herein (RT 4) does not charge a criminal offense.

III.

That there is no proof that the seeds in evidence were capable of germination.

IV.

That there is no proof that opium poppies were growing on appellant's land.

V.

That there is no proof that appellant obtained seed for the purpose of opium poppy production.

VI.

That counsel for the plaintiff was guilty of prejudicial misconduct.

I.

ERROR IN INSTRUCTION IS WAIVED UNLESS OBJECTED TO BEFORE THE JURY RETIRES.

As to Point I, it is to be noted that the defendant did not object to said instruction. Rule 30 of the Federal Rules of Criminal Procedure requires that a party objecting to an instruction declare his objection before the jury retires to consider its verdict. This, the defendant did not do. (RT 102.) See also *Nemec*

v. United States (9th CA), 178 F. 2d 656; *O'Conner v. United States* (9th CA), 175 F. 2d 477; *Zeigler v. United States,* 174 F. 2d 439; *Shockley v. United States,* 166 F. 2d 704.

HARMLESS ERROR IN INSTRUCTION IS NOT A GROUND FOR REVERSAL.

If instruction number 14 is in error, the error is harmless. (Rule 52, Federal Rules of Criminal Procedure.) Effective September 1, 1954, the statute of limitations on general crimes committed against the United States was amended and increased from three years to five years. This was not intended to, and did not, revive crimes which said statute had banned prior to September 1, 1955. On June 14, 1954, the indictment herein was filed. Said filing stopped the running of the statute as to all crimes therein charged, including Count 3. On said date, the charge embraced only crimes committed after June 14, 1951.

The Government concedes that instruction number 14, while correct as far as it goes, would have been more complete if it had included a proviso excepting the period June 14, 1949, to June 14, 1951. However, none of the evidence in this case concerns the excepted period and for that reason the error, if any, is harmless and should be disregarded. (Rule 52a, Federal Rules of Criminal Procedure.) *Ledbetter v. United States,* 170 U.S. 606, 42 Law. Ed. 1162; *Berg v. United States* (9th CA), 176 F. 2d 122; *Morrissette v. United*

States, 187 F. 2d 427; *United States v. Grayson,* 166 F. 2d 863; *Land v. United States,* 177 F. 2d 346.

All of the evidence in this case concerns evidence occurring in 1954, except the testimony concerning the prior growing of opium poppies and it concerns 1953:

> "Q. Did the defendant say anything about where he might have obtained the seeds which you have seen?
>
> A. He mentioned buying them in a drug store. That was the first and I believe he also stated that he had used some of the seeds later that year from plants he had the previous year." (R.T 40.)

The plaintiff submits that if instruction number 14 is in error, the error was harmless and also that the error, if any, has been waived by the defendant's failure to object to it.

II.

MERE IRREGULARITIES AND MINOR DEFECTS IN AN INDICTMENT MUST BE RAISED BY MOTION BEFORE TRIAL OR ARE DEEMED WAIVED.

The defendant urges that Count 3 of the Indictment does not charge a criminal offense because the exact time of the offense is not set forth. It is not essential that the exact time of the offense be set forth in the Indictment. It is sufficient if the allegations are sufficiently definite to inform the accused of the charge that he must meet. (Rule 7c of the Federal Rules of Criminal Procedure.) Furthermore, as the

defendant did not question the sufficiency of the Indictment by motion in the trial Court, he has waived any irregularities other than jurisdiction or that the Indictment fails to charge an offense. (Rule 12b, Federal Rules of Criminal Procedure.) *Witt v. United States* (CA 9th), 196 F. 2d 285. The date of the offense is not a material allegation. *Ledbetter v. United States, Berg v. United States, Land v. United States, supra.*

III.

IT IS NOT AN ELEMENT OF ANY OFFENSE CHARGED IN 21 USCA 188-188n THAT ANY SEEDS THEREIN DESCRIBED BE CAPABLE OF GERMINATION.

The defendant concedes that there is no evidence that the seeds introduced in evidence (Plaintiff's Exhibits 2, 3, 4, 5, and 6) were capable of germination; however, the statute does not specify that the seeds must be so. (21 USCA 188-188n.) The evidence does reveal that the defendant obtained seeds and sowed the crop which was standing on his land. He obtained these seeds partly from a third person and partly from opium plants which he had grown in 1953. (RT 19, 35, and 40.) It is obvious that the seeds that he obtained were capable of germination, because they grew. Inasmuch as he, in fact, obtained them and in fact produced opium poppies from them knowing what they were, the jury was entitled to draw the inference that he had obtained them for the purpose of opium poppy production.

IV.

THE RECORD AFFORDS AMPLE PROOF THAT OPIUM POPPIES WERE GROWING ON APPELLANT'S LAND.

The Court's attention is directed to the record, as follows:

1. State Narcotic Inspector House was qualified to recognize opium poppies and he saw them on defendant's land. (RT 13, 14, and 25.)

2. The plants were pulled up and the pods therefrom taken to a chemist who was qualified to and did identify them as opium poppy pods. (RT 28, 38, 43, and 49.)

As the defendant suggests, it may be that from the direct examination of the witness House, standing alone, there is no connection shown between the plants seen growing in the yard and the pods analyzed by the chemist. However, the defendant overlooks the testimony of the witness Crawford and the cross-examination of Inspector House. (RT 28, 38, and 43.) If there is sufficient evidence to go to the jury in a criminal case, the Appeal Court will not weigh the facts and determine the guilt or innocence of the accused by a mere preponderance of the evidence, but will limit its decisions to questions of law. *Burton v. United States,* 202 U.S. 344; *Miles v. United States,* 103 U.S. 304; *Kramer v. United States* (9th CA), 166 F. 2d 515.

defendant did not question the sufficiency of the Indictment by motion in the trial Court, he has waived any irregularities other than jurisdiction or that the Indictment fails to charge an offense. (Rule 12b, Federal Rules of Criminal Procedure.) *Witt v. United States* (CA 9th), 196 F. 2d 285. The date of the offense is not a material allegation. *Ledbetter v. United States, Berg v. United States, Land v. United States, supra.*

III.

IT IS NOT AN ELEMENT OF ANY OFFENSE CHARGED IN 21 USCA 188-188n THAT ANY SEEDS THEREIN DESCRIBED BE CAPABLE OF GERMINATION.

The defendant concedes that there is no evidence that the seeds introduced in evidence (Plaintiff's Exhibits 2, 3, 4, 5, and 6) were capable of germination; however, the statute does not specify that the seeds must be so. (21 USCA 188-188n.) The evidence does reveal that the defendant obtained seeds and sowed the crop which was standing on his land. He obtained these seeds partly from a third person and partly from opium plants which he had grown in 1953. (RT 19, 35, and 40.) It is obvious that the seeds that he obtained were capable of germination, because they grew. Inasmuch as he, in fact, obtained them and in fact produced opium poppies from them knowing what they were, the jury was entitled to draw the inference that he had obtained them for the purpose of opium poppy production.

IV.

THE RECORD AFFORDS AMPLE PROOF THAT OPIUM POPPIES WERE GROWING ON APPELLANT'S LAND.

The Court's attention is directed to the record, as follows:

1. State Narcotic Inspector House was qualified to recognize opium poppies and he saw them on defendant's land. (RT 13, 14, and 25.)

2. The plants were pulled up and the pods therefrom taken to a chemist who was qualified to and did identify them as opium poppy pods. (RT 28, 38, 43, and 49.)

As the defendant suggests, it may be that from the direct examination of the witness House, standing alone, there is no connection shown between the plants seen growing in the yard and the pods analyzed by the chemist. However, the defendant overlooks the testimony of the witness Crawford and the cross-examination of Inspector House. (RT 28, 38, and 43.) If there is sufficient evidence to go to the jury in a criminal case, the Appeal Court will not weigh the facts and determine the guilt or innocence of the accused by a mere preponderance of the evidence, but will limit its decisions to questions of law. *Burton v. United States,* 202 U.S. 344; *Miles v. United States,* 103 U.S. 304; *Kramer v. United States* (9th CA), 166 F. 2d 515.

V.

THAT THERE IS NO PROOF THAT APPELLANT OBTAINED SEED FOR THE PURPOSE OF OPIUM POPPY PRODUCTION.

The defendant admits that he obtained seed and planted it knowing what it was and grew opium poppies. (RT 18, 21, 35, 39 and 40.) Inasmuch as the common purpose of any seed is to grow the plant of which it is the potential and as he, in fact, produced opium poppies with the seed which he obtained, a justifiable inference may certainly be drawn and was drawn by the jury that he had such an intent at the time he obtained the seed.

VI.

THAT COUNSEL FOR THE PLAINTIFF WAS GUILTY OF PREJUDICIAL MISCONDUCT.

The defendant alleges that he was deprived of a fair trial by misconduct of the United States Attorney and quotes from the transcript herein in nine places. To read the transcript in its entirety is all that is necessary to see the falsity of his allegation. The remarks of counsel were neither inflammatory nor prejudicial, nor did he testify. Nor did he imply that the defendant was a narcotic addict.

IN THE ABSENCE OF TIMELY OBJECTION, MISCONDUCT OF COUNSEL IS DEEMED TO HAVE BEEN WAIVED.

It may first be noticed that the defendant did not object to counsel's comments, except at two points

and in regard to two remarks. (RT 88 and 90.) Unless he has objected and requested an admonition, the defendant cannot complain of remarks of counsel. *United States v. Socony-Vacuum Oil Co.,* 60 Supreme Court 811, 310 U.S. 150, 84 Law Ed. 129; *Ochoa v. United States* (9th CA), 167 F. 2d 341; *Langford v. United States* (9th CA), 178 F. 2d 48; *Nemic v. United States, supra; Corley v. Cozart,* 115 F. 2d 119, wherein at page 119, the Court says as follows:

> "Assignment 21 is that the court erred in permitting the case to go to the jury after government counsel had made a closing argument portions of which the assignment characterizes as 'prejudicial misconduct.' There was, at the time of the argument, no objection thereto except a statement by appellant's counsel that he was going to assign as misconduct and as being improper 'the allusion to (appellant) as a narcotic peddler.' There was, in fact, no such allusion, nor did appellant at any time object to the submission of the case to the jury. There is, therefore, no basis for this assignment."

MISCONDUCT OF COUNSEL IS CURED BY A CORRECTIVE ADMONITION TO THE JURY OR BY A CORRECTIVE INSTRUCTION.

In the two places where the defendant did object, the Court admonished the jury on the point in question. Furthermore, in his instructions, the Court instructed the jury to disregard the remarks of counsel in weighing the evidence. (RT 76, 77, 88, and 90.) Said admonition and instruction had the effect of

curing any possible prejudice. 88 C.J.S. 394, Section 200; *Carr v. Standard Oil Company,* 181 F. 2d 15; *Weeks v. Scharer,* 129 F. 333.

NO ACTION OF COUNSEL WAS IN FACT MISCONDUCT OR PREJUDICIAL.

Nor were any of these remarks inflammatory or prejudicial. In the order mentioned in the defendant's brief, they were as follows:

On page 17 of his brief the defendant quotes from reporter's transcript, pages 82 and 84, three instances wherein the United States Attorney characterizes this case as a narcotic case. This Indictment was brought under 21 USCA 188-188n, entitled "DOMESTIC CONTROL OF PRODUCTION AND DISTRIBUTION OF THE OPIUM POPPY", and under policy described in 21 USCA 188, as follows:

> "It is the purpose of sections 188-188n of this title (1) to discharge more effectively the obligations of the United States under the International Opium Convention of 1912, and the Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs of 1931."

It is obviously a narcotic case and it was not improper so to characterize it; nor was objection made to this characterization at the time it was made during trial.

Also, on page 17 of his brief, the defendant proclaims that counsel commented upon the large number

of opium poppy seeds possessed by him and the use to which they might be put. This was surely fair comment on the evidence in the light of the underlying purpose of the statute, nor was objection made to this at the time of trial. Also, on page 17 of his brief, the defendant complains of the following language of the United States Attorney from page 90 of the reporter's transcript:

> "Furthermore, I do not believe that he just used the seeds to make the tea, either. Inasmuch as he was growing a narcotic plant, it would seem to me that he would make use of the narcotic in the plant rather than the seed. But as I mentioned before * * *"

It is quite apparent from the record that counsel was drawing the inference that where common experience shows a strong probability that a certain thing will be used in a certain way (seeds will be planted and the common fruits therefrom collected and used), it probably has been so used in the instant case, rather than used in some rare or unusual way (seeds ground up to make tea). The record reveals that this comment was so intended and appellee believes that the jury so understood it. The word "use" was obviously intended in its general sense. Counsel did not there characterize the defendant as a "user", nor did he at any time refer to the defendant as a narcotic addict or "user". However, to this remark the defendant objected and if there were any prejudice it was cured by the admonition which followed:

> "The Court. The motion for a mistrial will be denied. Ladies and gentlemen of the jury, there

> is no evidence, as you know, to the effect that the defendant in this particular case was a user of narcotics, that he intended to use these poppies for the ultimate production of narcotics, and the evidence, so far as the Court recalls, is merely that he was producing the plant, as testified. You are instructed that in your deliberations and in arriving at your verdict, you should dismiss from your mind any comment made by counsel on this particular point." (RT 90-91.)

On page 18 of his brief, the defendant complains that counsel commented upon the social dangers attending the production and use of narcotics. It is surely proper to comment upon the purpose of a statute and upon the evil which it seeks to correct; nor did the defendant object to this at the time of trial.

On pages 20 and 21 of his brief, the defendant alleges that he was denied a fair trial because counsel "testified" as a matter of his "personal knowledge." The record reveals that this is palpably untrue.

It is quite necessary and proper for counsel to rely on his own experience on expounding his ideas. 88 C.J.S. 355, Section 181b: "Counsel may properly argue and comment on self-evident facts and matters of common knowledge outside the record." *United States v. Howard,* 96 F. 2d 893. Indeed, every man must do so, for he has nothing else upon which to rely. Every man must assume that in common every day matters his experience is similar to that of another. If he did not do so, he could not communicate with others on any subject. In the instant case, when

counsel argued: "In the second place, you just can't buy poppy seeds in any drug store in this country I know of." (RT 88), he meant no more than that common experience shows that *opium* poppy seeds cannot be purchased in a drug store in this country. Albeit his choice of language was inelegant, he would have put his meaning more clearly if he had used "common experience reveals" in place of "I know of", or, perhaps had rhetorically declared, "Do you know of any drug store in this country where opium poppy seeds can be bought?" But despite his choice of language, the record reveals that he was not testifying to facts within his own personal knowledge.

On page 89 of the record, counsel repeats the declaration made on page 88. This is not, and could not, be in the record, but the repetition was made because the last four words of the first declaration, "that I know of," were made inaudible by the first four words uttered by defendant's counsel, "I object to that." and counsel thought that these words were unheard by the Court. Other than this, the repetition has no bearing upon the claim of prejudice now made. The defendant objected to these remarks and if there were any prejudice, it was cured by the admonition wrich followed:

> "The Court. Ladies and gentlemen, this comes under what I told you in the beginning. We occasionally run into statements by counsel, in the course of arguments, and they are objected to. There is no evidence, as evidence, presented before you that you can't buy poppy seed in a drug

> store. Counsel has said that he doesn't know of any. I call your attention specifically to point that there is no proof or evidence on that point. Its materiality is something else. I think, counsel, that the comment concerning the inability to purchase these seeds should be stricken." (RT 89.)

On page 90 of the transcript, counsel is apparently of the opinion that it is within the fair boundaries of argument to tell the jury that he does not believe a self-serving portion of the defendant's statement in evidence. He is right. This is within the boundaries of fair comment. *Hallinan v. United States* (9th CA), 182 F. 2d 880, where at page 885 the Court declares as follows:

> "Of course, counsel may, and often does, in argument to the jury, after the evidence has been presented, give the jury the benefit of his opinion of the veracity of the witnesses and the character and weight of testimony presented. That is the orderly manner and proper time to do so and the full duty which a lawyer owes to his client in this respect may then be fully discharged."

That he added that the basis for his belief was based on his experience (meaning common experience), added nothing to the declaration. What else could he have based it on? At all events, he was not testifying. This is as though he had said, "I did not believe the defendant when he testified that he went swimming and did not get wet, and the basis for my belief is my own experience."

For the foregoing reasons the appellee respectfully submits that the judgment herein should be affirmed.

Dated, Sacramento, California,
December 16, 1955.

LLOYD H. BURKE,
United States Attorney,
By JAMES S. EDDY,
Assistant United States Attorney,
Attorneys for Appellee.